



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Atmospheric Research Systems, Inc.

**File:** B-240187

**Date:** October 26, 1990

Jacob B. Pompan, Esq., Pompan, Ruffner & Bass, for the protester.

S.J. Evans, National Aeronautics and Space Administration, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Contention that agency improperly evaluated protester's technical proposal is denied where record indicates that agency evaluation was reasonable and in accordance with stated evaluation criteria, and where protester fails to rebut or reply to any of the agency's detailed responses to the evaluation challenge.

2. Contention that awardee had unfair competitive advantage due to experience gained by its subcontractor is untimely when raised more than 4 months after agency responded to protester's initial complaint on this basis by providing designs and drawings intended to eliminate any improper competitive advantage enjoyed by the subcontractor.

3. Protest alleging that agency failed to conduct meaningful discussions is untimely when first raised after receipt of the agency report where the agency provided a preaward debriefing to protester indicating the major weaknesses in its proposal and the protester had all the information it needed to include this argument in its initial timely protest filed after the debriefing.

### DECISION

Atmospheric Research Systems, Inc. (ARS) protests its rejection from further consideration for award under request for proposals (RFP) No. 8-H-9-ES-21493, issued by the National

0498601/142561

Aeronautics and Space Administration (NASA) for the development and fabrication of a replacement Electric Field Mill Network for the Launch Pad Lightning Warning System. ARS argues that NASA improperly evaluated its technical proposal, and directed award to ENSCO, Inc. because of NASA's relationship with ENSCO's subcontractor, Thunderstorm Technology. ARS also claims that Thunderstorm Technology gave ENSCO access to information not available to other offerors, obtained as a result of Thunderstorm Technology's close relationship with NASA.

We deny the protest in part and dismiss it in part.

#### BACKGROUND

The solicitation, a small business set-aside, sought fixed-price offers for the development and fabrication of up to 64 electric field mill sensors and a base station to replace the existing sensors within the Launch Pad Lightning Warning System. This system is used to evaluate lightning threats around the launch complexes at the John F. Kennedy Space Center and the Eastern Space and Missile Center. The solicitation required development of a prototype digital electric field mill sensor within the 120-day base performance period, followed by fabrication and deployment of up to 64 of the new sensors over the course of 3 option periods. Although more than 41 firms were solicited, only ARS and ENSCO submitted proposals by the March 2, 1990, due date.

Based on the initial evaluation of the two proposals by the Technical Evaluation Committee, the ENSCO proposal was rated "excellent," while the ARS proposal was rated "poor." Although the ARS proposal was viewed as unacceptable as submitted, the evaluation committee concluded that ARS's proposal could be made acceptable with changes and should be included in the competitive range, and provided a list of questions to the contracting officer intended to draw ARS's attention to the weaknesses in its proposal. Written discussions were conducted with both offerors beginning April 16, and best and final offers were submitted on April 27.

Upon reviewing the revised proposals, the Technical Evaluation Committee concluded that the relative standing of the two offerors remained unchanged and recommended selection of ENSCO for final negotiations leading to the award of a contract. On June 21, NASA provided a debriefing to ARS, at which it explained that the ARS proposal was found to have five major weaknesses. On June 25, ARS filed a protest with our Office challenging the evaluation of its technical proposal, and alleging that ENSCO obtained an improper competitive advantage as a result of its relationship with its proposed

subcontractor. Award of a contract to ENSCO has been stayed pending the outcome of this protest.

#### TECHNICAL EVALUATION

In its challenge to the evaluation of its proposal, ARS claims that NASA erred in its conclusions related to each of the five major weaknesses identified during the debriefing. Despite NASA's detailed response in its report on the protest to each challenge, ARS failed to rebut or otherwise address any of NASA's arguments in its comments on the agency report.

In considering protests against an agency's evaluation of proposals, we will examine the record to determine whether the evaluation was reasonable and consistent with the evaluation criteria. Mine Safety Appliances Co., B-238597.2, July 5, 1990, 69 Comp. Gen. \_\_\_, 90-2 CPD ¶ 11. Here, we have considered ARS's proposal, the evaluation materials, NASA's detailed response to each of ARS's specific arguments, and ARS's failure to reply to any of NASA's responses. As a result of our review, we find no basis for concluding that the evaluation was unreasonable or not in accordance with the stated evaluation criteria. To illustrate our conclusion, we will discuss in detail one of the main deficiencies identified by NASA, the grade of stainless steel proposed by ARS.

In its initial protest ARS challenged the Technical Evaluation Committee's conclusion, communicated during the debriefing, that the grade of stainless steel chosen by ARS for constructing field mill sensors would corrode quickly in the coastal environment around Kennedy Space Center in Florida. According to ARS, its choice of stainless steel--grade 304--is equally resistant to corrosion under the conditions specified in the RFP as grade 316, allegedly suggested by NASA technical officials during the debriefing as more appropriate for this use. Further, ARS argues that if only stainless steel grade 316 or better were acceptable, then the solicitation should have so stated. Finally, ARS points to data published by the National Association of Corrosive Engineers that it says demonstrates that the corrosive rates of stainless steel grades 304 and 316 are virtually the same when exposed to light salt concentrations.

In response, NASA explains that it has experience with stainless steel grade 304, and has found that it tarnishes quickly when used in seacoast environments. Further, contrary to ARS's assertions, NASA denies that it said that only stainless steel grade 316 would be appropriate for fabricating the field mill sensors. Rather, when ARS asked for examples of grades of stainless steel that would not corrode in the seacoast environment, NASA suggested 3 grades--grades 314, 316, or 320--as examples. NASA explained that it did not

specify a particular grade of stainless steel because of the trade-off between hardness and resistance to corrosion, and a desire to permit offerors some flexibility in balancing the two concerns in designing and fabricating the field mill sensors. Finally, NASA responds that if ARS had access to published information establishing that stainless steel grade 304 was not susceptible to corrosion under seacoast conditions, then ARS should have provided that information in response to the written question to ARS during discussions asking for such an analysis.<sup>1/</sup> According to NASA, failure to provide such information when asked indicates ARS's lack of diligence in preparing a proposal that met the agency's requirements.

We find NASA's response to be reasonable and convincing, especially in the light of ARS's failure to counter any of the agency's explanations. See Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, aff'd, B-238009.3, Sept. 4, 1990, 90-2 CPD ¶ \_\_\_\_ (agency cost estimate provided in response to protest should be accepted where protester fails to rebut the estimate, despite opportunity to do so). Further, we agree with the agency's assertion that if ARS had access to analyses or information that would have established the appropriateness of its choice of grade of stainless steel, ARS bears the consequences of failing to produce that information when asked.

Accordingly, ARS's challenge to the evaluation of its technical proposal is denied.

#### AWARDEE'S PROPOSED SUBCONTRACTOR

ARS argues that ENSCO received, through its subcontractor, Thunderstorm Technology, information that was not available to other offerors, as well as favored treatment from NASA.

With respect to whether ENSCO obtained an unfair advantage due to access to information from Thunderstorm Technology, the protest is untimely. ARS first challenged Thunderstorm Technology's participation in this procurement by letter to the contracting officer dated January 18. At that time, ARS argued that Thunderstorm Technology should not be permitted to compete because of the potential unfair advantage it might possess over other offerors in light of its work on development of a prototype electronic field mill under a previous

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<sup>1/</sup> The record shows that question number 2 in the written discussions with ARS on April 16, asked ARS to "[p]rovide an analysis demonstrating corrosion nonsusceptibility of exposed parts in a seacoast environment." ARS responded in its best and final offer that no such analysis was available.

NASA contract, unless all drawings and designs furnished under that contract were made available to other prospective offerors. NASA agreed and provided the drawings and designs at issue. ARS verbally acknowledged receipt of these documents on February 14, and acknowledged receipt in writing with submission of its initial proposal on March 2.

Upon receipt of the Thunderstorm Technology drawings and documents, ARS had the basis to argue that the drawings were insufficient to eliminate any alleged competitive advantage. If ARS believed that additional information should have been provided to offerors, it should have raised the issue within 10 days of receiving the Thunderstorm Technology drawings from NASA. Since this issue was first raised on June 25, more than 4 months after ARS acknowledged receipt of the documents provided in response to its earlier complaint, the protest on this ground is untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1990).

With respect to ENSCO's use of Thunderstorm Technology as a subcontractor, ARS complains that NASA officials improperly directed award to ENSCO because of the relationship between NASA and the subcontractor. The record contains no evidence of such wrongdoing or bias and ARS offers none. Further, ARS failed to address the agency's response to this claim in its comments to the agency report. Such bald assertions of agency wrongdoing by a disappointed offeror do not establish agency bias. Metrolina Medical Peer Review Found., B-233007, Jan. 31, 1989, 89-1 CPD ¶ 97.

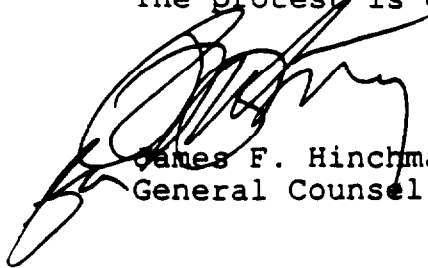
#### ADEQUACY OF DISCUSSIONS

In its comments on the agency report on the protest, ARS claimed, for the first time, that the discussions conducted by NASA were inadequate to alert ARS to the weaknesses in its proposal. According to ARS, it first learned from the agency report that, in NASA's view, its initial technical proposal would require significant technical improvements to be made acceptable, and, thus, that the discussions conducted here were inadequate.

ARS was required to make this argument within 10 days of receiving its debriefing from NASA, and its protest in this regard is now untimely. 4 C.F.R. § 21.2(a)(2). ARS's initial protest, filed within 10 days of receiving its debriefing, challenged in great detail each of the major weaknesses identified by the Technical Evaluation Committee in the ARS technical proposal. ARS was made aware of those weaknesses during the debriefing, and does not now argue that its proposal was rejected for reasons not stated there. Since these weaknesses were described as major and resulted in rejection of its proposal, after the debriefing ARS had the

basis it needed to challenge the adequacy of discussions to alert the company to those flaws in its technical proposal. See Hunter Env'tl. Servs., Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251 (challenge to evaluation untimely when not filed within 10 days of debriefing because other information cited by protester did not add information that could not be deduced from the debriefing).

The protest is denied in part and dismissed in part.



James F. Hinchman  
General Counsel